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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-743

ANTHONY TORTORELLO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit as follows:

A.

Opinion Below

The United States Court of Appeals for the Second Circuit by judgment entered on the 21st day of September, 1972, unanimously affirmed a judgment in the United States District Court for the Eastern District of New York con-

victing petitioner of aiding and abetting the forgery and uttering by others of United States Savings Bonds in violation of Title 18, United States Code, §§2 and 495, after trial before Chief Judge Jacob Mishler and a jury.

The opinion of the United States Court of Appeals for the Second Circuit is set forth in Appendix A hereof.

There were no other opinions written in connection with the case.

B.

The Grounds on Which the Jurisdiction of This Court Is Invoked

Jurisdiction of this Court is invoked under Title 28, Section 1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1 of the Rules of this Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on September 21, 1972, as aforesaid.

C.

The Questions Presented for Review

Was the evidence sufficient in law to sustain the conviction of petitioner?

(Petitioner also adopts all applicable arguments raised by other petitioners herein.)

D.

Constitutional Provision and Statutes Involved

(1) The constitutional provision involved is the due process clause of the Fifth Amendment to the United States Constitution.

(2) The statutes involved are Sections 2 and 495 of the United States Code, Title 18.

Each of the foregoing are set forth in pertinent part in Appendix B of this petition.

E.

A Concise Statement of the Case and the Material Facts Pertaining to Consideration of the Questions Presented

(1) *Statement of the Case*

Petitioner Anthony Tortorello was indicted in the United States District Court for the Eastern District of New York under Indictment No. 70 CR 152 along with ten other defendants.

The indictment contained twenty-eight counts. Petitioner Tortorello was named as a defendant in all the counts except Counts 2, 3 and 28. Count 1 was the conspiracy count. The remaining counts charged substantive crimes of forging and uttering certain specified U.S. Savings Bonds.

Trial was held before Chief Judge Jacob Mishler and a jury commencing on January 3, 1972 and ending with the verdict of the jury on January 28, 1972.

Petitioner Tortorello was convicted of substantive crimes of forging and uttering under Counts 22-27 inclusive. He was acquitted of the conspiracy count (Count 1) and substantive Counts 4-21 inclusive.

On February 18, 1972 petitioner Tortorello was sentenced to a prison term of one year and one day. He was continued on bail by the United States Court of Appeals pending the determination of this petition. The time to file this petition was extended to November 20, 1972 by order of Mr. Justice Marshall dated October 16, 1972.

(2) *Statement of Facts*

The pertinent facts relating to petitioner Tortorello are set forth at length under the argument in Part G, *infra*, and, accordingly, are not reiterated herein.

F.

Basis for Jurisdiction in the United States District Court

The jurisdiction of the United States District Court below was invoked upon the ground that the crimes charged were violations of Federal Law, to wit, Title 18 U.S.C. §2 and 18 U.S.C. §495.

G.

Argument Amplifying the Reasons Relied on for the Allowance of the Writ

POINT ONE

The evidence was insufficient in law to establish Appellant's guilt beyond a reasonable doubt as to those counts of which he was convicted.

Appellant Tortorello was charged in twenty-five counts of the indictment. By the verdict of the jury he was acquitted of nineteen counts and convicted of the last six counts.

The counts of which he was acquitted were as follows:

Count 1: Conspiracy to forge and utter U.S. Savings Bonds and Postal Money Orders.

Counts 4-5:* Forging and uttering savings bonds in the name of Arthur Solomon on May 2, 1968.

Counts 6-7: Same offenses as to bonds in the name of Arthur Solomon on May 15, 1968.

Counts 8-9: Same offenses as to bonds in the name of Janet Lee Wesselholt on May 15, 1968.

Counts 10-11: Same offenses as to bonds in the name of James Tebbetts between August 27, 1968 and August 29, 1968.

Counts 12-13: Same offenses as to bonds in the name of W. Johnson Halleck or Mrs. Janet Halleck Reed on October 18, 1968.

* Counts 2 and 3 did not name appellant Tortorello.

Counts 14-15: Same offenses as to bonds in the name of Mrs. Victoria Theodore on October 14, 1960.

Counts 16-17: Same offenses as to bonds in the name of Thomas Michael Mustaleski on October 22, 1968.

Counts 18-19: Same offenses as to bonds in the name of James E. Tebbetts on October 22, 1968.

Counts 20-21: Same offenses as to bonds in the name of Joseph H. Newman or Michael J. Newman on October 23, 1968.

The counts of which Tortorello was convicted were the last six counts (Counts 22-27 inclusive) of the indictment. These actually referred to three transactions, each of which was divided into two counts—one count charging the forgery of the particular bonds and one count charging uttering of the bonds. The six counts are as follows:

Counts 22-23: Forging and uttering savings bonds in the name of Anton H. Heller on December 4, 1968.

Counts 24-25: Same offenses as to bonds in the name of Wanton Heller on December 4, 1968.

Counts 26-27: Same offenses as to bonds in the name of Robert Kessler on December 20, 1968.

It was the Government's theory as to all the counts that Tortorello aided and abetted the forging and uttering of the bonds by others in that he allegedly supplied blank

drivers' licenses, social security and draft cards which the others were enabled to fill in and present themselves as the purported payees described in the bonds.

We turn now to the evidence bearing upon Tortorello's alleged participation as an aider and abettor in substantive Counts 22-27. That evidence came from Charles Graham, a witness for the government. Graham testified generally that he was a co-conspirator who obtained the bonds from various other defendants and procured others to forge and cash them after which he shared in the proceeds with various co-conspirators other than Tortorello.

With respect to Tortorello, the testimony of Graham was as follows:

Graham testified that during the spring of 1968 he was a party to conversations in which he heard defendants Leo Conforti and Steven Insalaco discussing obtaining false identification from Tortorello.* Graham also heard conversations between Conforti and Insalaco that defendant Michael Conforti also supplied them with false drivers' licenses.

Graham went on to testify that in July of 1968, he told Leo Conforti that he needed more identifications. Leo replied that he would contact Tortorello. Later that night, in a bar called Nero's Nook, Leo Conforti told Graham and defendant Roche to remain in the bar and Tortorello would come by with identifications.

Sometime later that evening, Tortorello allegedly came to the bar and handed Roche a white envelope which Roche

---

* An earlier Government witness, Richard Marabatte, had testified that Leo Conforti told him that a set of blank identification consisting of one driver's license, one social security card and one draft card cost $8.

placed on the refrigerator in the kitchen of the bar. Thereafter, Graham took the envelope, and went upstairs with it. The envelope contained blank New York State drivers' licenses, social security cards and draft cards. There were approximately twenty of each type.

Graham was asked what names he had typed on that identification to cash bonds on subsequent dates. He stated that he had typed the names of Mustaleski, Tebbetts, Theodore, Newman, Halleck, "and a few others I don't remember."

Graham went on to testify that he procured various others to cash these bonds. The Mustaleski bonds (Government Exhibit 17) were cashed on October 22, 1968. The Theodore bonds (Government Exhibit 8) were cashed on October 14, 1968. The Tebbetts bonds (Government Exhibit 7) were cashed on August 27, 1968. Another one of the Tebbetts bonds (Government Exhibit 6) was cashed on September 27, 1968. The Newman bonds (Government Exhibit 14) were cashed on October 23, 1968.

Graham further testified that the above bonds (Government Exhibits 14, 17, 8, 7 and 6) were cashed with the use of identifications allegedly supplied by Tortorello when he delivered the envelope containing them to Roche at Nero's Nook in July 1968.

It is pertinent to point out at this juncture that all the above bonds were encompassed in Counts 16-17 (Mustaleski), Counts 14-15 (Theodore), Counts 10-11 and 18-19 (Tebbetts) and Counts 20-21 (Newman). Tortorello was acquitted as to all these counts.

We observe also that Counts 4-21 all refer to bonds forged during the period between May 2, 1968 and October

23, 1968 inclusive. These are the substantive counts of which the jury acquitted Tortorello.

The six counts of which Tortorello was convicted (Counts 22-27 inclusive) all relate to the subsequent month of December, 1968.

We turn, therefore, to the testimony in the trial record dealing with identification alleged to have been used in December, 1968 and alleged to have been supplied by Tortorello.

More specifically, the counts of which Tortorello was convicted dealt with the forging of bonds in the name of Anton H. Heller on December 4, 1968 (Counts 22-23), bonds in the name of Wanton Heller on December 4, 1968 (Counts 24-25) and bonds in the name of Robert Kessler on December 20, 1968 (Counts 26-27).

Graham testified that in late November or early December of 1968 he and defendant Steven Insalaco went to a house on Bay 50th Street in Brooklyn where they acquired a package of blank U.S. Savings Bonds. The package contained blank bonds of which the aggregate face value was $25,000, mostly in $25 denominations.

Some of the bonds were subsequently filled in with the names of fictitious payees selected from a telephone directory. The names so filled in were Anton H. Heller, Wanton Heller and Robert Kessler.

Graham testified that the Robert Kessler bonds and the Wanton Heller bonds were forged and cashed by defendant Moskowitz in December, 1968. He could not recall any other bonds forged by Moskowitz.

The aforementioned bonds refer to Counts 24-25 (Wanton Heller bonds) and Counts 26-27 (Robert Kessler bonds).

The only evidence in the record purporting to link Tortorello to the aforementioned bonds is found in Graham's direct examination on Page 2504 of the trial transcript as follows:

> "Q. Now, Mr. Graham, the bonds you have identified as having been obtained from Bay Street and having been forged and uttered by Mr. Moskowitz, do you know where the identification necessary for this moving came from? A. Yes.
>
> "Q. Where did it come from? A. It came from Mr. Tortorello.
>
> "Q. Now—
>
> "Mr. Sonenshine: If your honor please, reflecting on the last question and answer, I move that it be stricken in view of the nature of the question put as to his knowledge.
>
> "The Court: May I have the question?
>
> (Question read)
>
> "The Court: It came from—motion denied."

So far as the writer can ascertain from examination of the entire record, the above quoted question and answer constituted all of the evidence presented to the jury by the prosecution in support of their position that Tortorello aided and abetted the forging and uttering of the bonds referred to in Counts 22-23, 24-25 and 26-27.

We urge, initially, that the motion to strike the quoted answer that the identification "came from Mr. Tortorello" should have been granted. The question itself was im-

proper and called for a conclusion since by its terms it did not purport to be something the witness saw or heard.

If we are correct in this contention, it would follow, therefore, that the record is totally devoid of any evidence at all to criminally implicate Tortorello in Counts 22-27 inclusive.

We urge further that even if the quoted answer must stand in the record, it is insufficient to sustain the conviction under Counts 22-27 inclusive.

Since Tortorello was acquitted of the conspiracy charge, his complicity in the substantive charges can only be established by proof under Title 18, §2, that he aided and abetted the forgeries. This section requires more than mere proof that he furnished blank identifications to any of the alleged conspirators. The prosecution would be additionally required to establish that the alleged delivery of the blank identifications was occasioned with knowledge on the part of Tortorello that it would be used to assist in the forging and uttering of the bonds in question. The record discloses no evidence to support such a finding.

The classic test of aiding and abetting is found in *Nye & Nissen* v. *U. S.*, 336 U.S. 613, 619, 63 S. Ct. 766, where this Court stated:

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed.'"

We anticipate that the Government may seek to rely on the July delivery of identifications to defendant Roche in

Nero's Nook bar as evidence that those identifications may have been used by Graham the following December.

In such event we would urge that the transaction would be an isolated transaction insufficient to show knowledge by Tortorello of the vast multi-party scheme of the other defendants to deal continually in forging hundreds and hundreds of bonds in numerous banks over a long period of time. Nor would that one transaction show intent on Tortorello's part to associate himself with that grandiose venture.

The conversations allegedly overheard in May of that year by Graham between Conforti and Insalaco alluding to purchases of identifications from Tortorello are hearsay and not probative with respect to the substantive counts even though they might have been probative on the conspiracy count. Tortorello, however, was acquitted of the conspiracy charge.

The record at bar discloses no evidence whatever that Tortorello's alleged furnishings of blank identifications was done with any knowledge on his part of the objectives of his co-defendants or, indeed, any knowledge of the actual purpose for which the purchasers intended to use the identifications. Nor is there any evidence of any conversation between Tortorello and Graham or Roche or anyone else as to the intended use of the identifications allegedly supplied by Tortorello. There is only Graham's conclusory statement that the identifications were obtained from Tortorello. Beyond that, the record is silent.

We believe that pertinent to the issue here (indeed, directly in point) is the case of *United States* v. *Gallishaw*, 428 F.2d 760, 2nd Cir. (1970).

That case, as in the instant case, dealt with the extent to which an alleged aider and abettor was required to have knowledge of the substantive crime intended and ultimately committed by the actual perpetrator.

In *Gallishaw, supra,* a Government witness testified that Gallishaw supplied the gun substantively used in the robbery and when Gallishaw gave another defendant the gun, that defendant told Gallishaw that he would use it either to pull the bank job "or something else." Gallishaw was convicted.

The Court of Appeals reversed the conviction. Judge Feinberg in a detailed opinion pointed out at page 763:

> "On this record, to convict Gallishaw for the substantive crime of aiding and abetting a violation of 18 U.S.C. §2113(a), the Government would have had to show at a minimum that he knew that a bank was to be robbed."

The case against Tortorello, is even weaker, since Tortorello was not shown to have any knowledge whatever of the proposed use of the identifications allegedly supplied by him. In *Gallishaw, supra,* there was evidence that Gallishaw knew it would be used for a bank robbery "or something else." Yet even that was insufficient to sustain conviction.

CONCLUSION

The petition should be granted and this Court, in the exercise of its powers, should order that the judgment of conviction be reversed and the indictment dismissed.

Respectfully submitted,

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Of Counsel

APPENDIX A
Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 835, 839-41, 846-49—September Term, 1971.

(Argued June 30, 1972 Decided September 21, 1972.)

Docket Nos. 72-1203, 72-1211-17

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH CALABRO, LEONARD CONFORTI, JOHN CONFORTI, ANTHONY TORTORELLO, ANTHONY PICCIANO, RICHARD PASQUA, JOHN ROCHE and MARC MOSKOWITZ,

Appellants.

Before:

MOORE, SMITH and TIMBERS,

Circuit Judges.

Appeal from conviction on charges of forging and uttering stolen government obligations and conspiracy to do so in violation of 18 U.S.C. §§495 and 371, on trial to the jury in the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge.*

Affirmed.

JOSEPH ARONSTEIN, New York, New York, *for Appellant Calabro.*

JACK KAPLAN, New York, New York (John D. LaSalle, James E. Massey, Mark K. Sisitsky and Richard A. Toomey, Jr., New York, New York, of counsel), *for Appellant Leonard Conforti.*

DONALD NAWI, New York, New York, *for Appellant John Conforti.*

WILLIAM SONENSHINE, Brooklyn, New York (Evseroff, Newman & Sonenshine, Brooklyn, New York), *for Appellant Anthony Tortorello.*

THEODORE KRIEGER, New York, New York, on the brief, *for Appellants Anthony Picciano, Richard Pasqua, John Roche and Marc Moskowitz.*

MARSHALL TAMOR GOLDING, Attorney, U.S. Dept. of Justice, Washington, D. C. (Robert A. Morse, U.S. Attorney, Eastern District of New York, Liam S. Coonan, Special Attorney, U.S. Dept. of Justice, Washington, D. C.), *for Appellee.*

SMITH, *Circuit Judge:*

The testimony at this lengthy, multi-defendant trial revealed the existence of a large, well-organized, long-term scheme to "pass dirty paper," that is, to forge and cash stolen obligations of various sorts in and around the New York area. Each of the eight appellants was convicted on one or more counts of forging and uttering United States Series E Savings Bonds and United States postal money orders, in violation of 18 U.S.C. §495 or of conspiring to commit those offenses, in violation of 18 U.S.C. §371, after

a trial by jury in the United States District Court for the Eastern District of New York (Jacob Mishler, *Chief Judge.*)[1] Seven of the appellants were sentenced to terms of imprisonment, ranging in length from a year and a day to ten years; one was placed on probation.[2] Two co-defendants, Charles Graham and Richard Marabetti, pleaded guilty and testified for the government at trial. A ninth co-defendant found guilty, Joseph Chilli, did not appeal. Certain of the defendants claim that the evidence was insufficient to convict them, and all claim that numerous errors, some of constitutional magnitude, occurred during the course of the trial. We find that none of the claims warrants reversal and affirm the judgment below.

---

1 The first count charged all defendants with conspiracy to violate 18 U.S.C. §495 "by conspiring and agreeing to forge and to utter and publish as true U.S. Series E Savings Bonds and United States Postal Money Orders, with intent to defraud the United States, knowing the same to have been falsely made and forged." There were twenty-six paired counts (numbers two through twenty-seven) under §495, charging, respectively, the forging and uttering of specific instruments; counts two and three specified four postal money orders and the others named specific Series E Savings Bonds. A twenty-eighth count charging John Conforti and his wife Loretta with a violation of 18 U.S.C. §494 was dismissed by the court for lack of evidence.

All of the appellants except Anthony Tortorello were convicted on the conspiracy count. Leonard Conforti, named in all twenty-six substantive counts; John Conforti, named in fourteen, Marc Moskowitz, in six and Anthony Picciano, in two, were convicted on all counts charged. Tortorello was acquitted on eighteen of the twenty-four substantive counts in which he was named and John Roche was acquitted on two of the eight in which he was charged. Joseph Calabro, charged on two substantive counts dismissed at the start of the government's case, and Richard Pasqua were convicted of conspiracy only.

2 Leonard Conforti, John Conforti, and John Roche were sentenced to ten years imprisonment; Leonard was also fined $26,000. Joseph Calabro was sentenced to a five-year prison term and was fined $10,000. Richard Pasqua and Marc Moskowitz were each sentenced to five-year terms; Anthony Tortorello was sentenced to a year and a day, and Anthony Picciano was placed on probation.

I. The Facts

The testimony, primarily by Graham and Marabetti, longtime accomplices of the defendants, and by Martha Lane, Faye Rushford, Marie Matthews, and Carol Rabinow, women who played a more fleeting role in the organization, revealed that Leonard Conforti (sometimes referred to herein as "Leonard") and Steven Insalaco (a co-defendant who pleaded guilty during trial and whose case was then severed) were managers of a large "business" which forged and uttered stolen obligations; this indictment covers transactions in postal money orders and valid executed and blank unexecuted Series E Savings Bonds. The organization was multi-leveled; at the top were Leonard and Insalaco, who directed the operation and took a percentage of all proceeds from the cashing of the bonds and money orders. Most of the paper was purchased outright or on consignment from Joseph Calabro, though some drifted in from other sources. Calabro was referred to by Leonard and Insalaco as "the boss," who got "a cut of all the action." The middle level in the organization was comprised of "managers," who recruited the men or women who did the actual passing, supervised their activity, and were responsible for their profits. Marabetti was active at this level, operating mainly in New Jersey; Graham, Richard Pasqua and John Roche worked in New York. John Conforti had a position somewhere between this level and the higher one; though he entered the conspiracy later than the others, he was being primed for a leadership role in the enterprise.

The "movers" or "workers," who did the actual cashing of the bonds, were generally young women, although men, such as Marc Moskowitz, were also employed. Faye Rushford, Martha Lane, Marie Matthews, and Carol Rabinow, four such "movers" who testified at trial, were sometimes paid a percentage of the amounts they cashed (10-15%)

and sometimes received a stated amount for a day of cashing activity. The managers then took their share of the proceeds (from 10 to 35% depending on the person involved and the circumstances of the transaction) and passed the remainder on to Leonard and Insalaco. When the bonds were received on consignment, the supplier would be paid a percentage of the cash realized; Calabro took 17% on those obligations he supplied. To facilitate the passing of the obligations, Leonard and Insalaco purchased and supplied the managers with bogus identification papers, such as driver's licenses, draft cards, and Social Security cards; the major source of such papers was Tortorello, though Picciano also supplied some bogus identification.

The conspiracy was alleged to have run from July 1, 1966 to the filing of the indictment on March 11, 1970. Most of the incidents testified to occurred during 1967 and 1968; there was, however, proof of three episodes of cashing Savings Bonds during the summer of 1966. Michael Conforti, another brother of Leonard and John, Steven Insalaco, and Carol Rabinow were involved in those incidents. The bonds were cashed in banks in New York City; Rabinow, who did the actual cashing, received 10% of the proceeds and passed the rest to Conforti or Insalaco. Rabinow was arrested in late summer of 1966 and her involvement with the group ended at that point.

The next major series of transactions testified to occurred a year later, in the fall of 1967. In October of that year, Leonard Conforti learned of the possibility of purchasing stolen postal money orders; he and Insalaco approached Marabetti with an offer to work together cashing the orders. Leonard bought the obligations, which had been stolen from a Groveville, New Jersey post office, and the stamping machine necessary to validate them, and the three commenced forging and cashing them. Martha Lane, the woman who worked for Marabetti and actually cashed the

forged orders, testified that the cashing forays began at the Black Eagle Social Club, on 31st Street in Brooklyn, the central location for the group's activities at this time. She would depart from there, generally with Marabetti, and often with Pasqua or Roche too, and drive to a series of retail stores, at each of which she would buy $20-$30 of merchandise and pay with a forged $100 money order. She was given false identification by Leonard Conforti before she left the club and returned it to him after each trip. On returning to the Black Eagle, she gave the proceeds of the cashing to Leonard, Insalaco or Marabetti; when the merchandise purchased was liquor, it was generally used in the club. The money order activities were brought to an abrupt halt when Lane was arrested in Bergenfield, New Jersey on December 10, 1967.

Lane was immediately released on bail and testified that she was present at a conversation the day after her arrest in which Leonard and Insalaco discussed with Marabetti the possibility of venturing into United States Series E Savings Bonds instead of continuing with money orders. Marabetti and a partner of his, John Collerone, worked with Leonard, Insalaco and Pasqua during most of 1968, cashing such bonds at banks. Martha Lane, who cashed several thousand dollars worth of these bonds with Marabetti through May of 1968, testified to numerous cashing expeditions onto Long Island and in the areas surrounding New York City. During this period, she saw Calabro, described to her by Roche as "an associate of Leo and Steve's," at the Black Eagle on one occasion.

At the same time, Graham, who had been recruited in January of 1968, was building an organization of his own which also moved forged bonds dispensed by Leonard. The bonds cashed during this period were valid executed bonds stolen from the true owners and purchased from Calabro, and the "movers" forged the endorsements of the

true owners when they cashed the bonds. Graham continued to work with Leonard and Insalaco during the summer of 1968, and at that time, John Conforti was first linked with the cashing activities. In the early fall, John allowed Leonard and others to use his house for typing blank bonds and apparently did some typing himself. Faye Rushford, a waitress who had come to New York in early fall on Leonard's invitation to work in Nero's Nook, a bar he operated which many of the appellants frequented, testified that John told her, a week after her arrival at the start of October, that "We steal for a living. We get bonds."

During October Leonard reportedly told Graham to teach John the business, and John recruited Rushford to work with Graham and himself. In October, Rushfold cashed bonds with Graham several times, and in December, John and Graham completed the cashing of a large number of blank bonds stolen from a post office in California. Graham testified that the identification used to facilitate the cashing of several series of the bonds moved in late 1968 and listed in the indictment was supplied by Tortorello. In January of 1969, John and Graham took several trips—to Pennsylvania to collect money from Moskowitz, who had been cashing bonds there, and to Boston to investigate the possibility of establishing operations there. During that same month, Leonard told Graham to make John his partner; they were to split the profits equally.

The last set of ventures probed at trial occurred during the fall of 1969. Marie Matthews met Pasqua and Leonard at this time and worked with them on several occasions cashing bonds in banks on the west side of Manhattan; she testified that she earned about $3,000, which was 15% of the total proceeds of the work, in her 20 to 30 trips with Leonard and Pasqua. Matthews was arrested on December 4, 1969.

Finally, Marabetti testified that when he was released from jail in January of 1970, having completed a term on a related charge, he met with Leonard who told him that if he wanted to do any more work in the "bond business," he should see John, who was taking it over for Leonard.

II. Sufficiency of the Evidence

Three appellants challenge the sufficiency of the evidence to support their convictions. Preliminarily, Calabro and John Conforti make a broad attack on the conformity of the evidence with the offenses charged in the indictment. John contends that a Series E bond is not embraced within the wording of 18 U.S.C. §495 and Calabro argues that the forgery of endorsements on otherwise genuine bonds does not violate that section. Neither contention has merit. Section 495 prohibits, *inter alia*, the making, alteration, forgery or counterfeiting of "any deed, power of attorney, order, certificate, receipt, contract, or other writing" for the purpose of obtaining money from the United States and the publishing or uttering of any such writing with intent to defraud the United States, knowing the false or forged nature of the paper. In *Prussian* v. *United States*, 282 U.S. 675 (1931) the Supreme Court held, under the predecessor to §495, that an endorsement is a "writing" within the purview of that section. And a forged endorsement on an obligation such as a government savings bond, if made "for the purpose of obtaining a sum of money from the Treasury of the United States," constitutes a violation of §495. *Prussian* v. *United States*, *supra*; *United States* v. *Campo*, 414 F.2d 765 (2d Cir. 1969). Each of the forgery counts charged that the endorsements were forged for the purpose of obtaining money from the United States and each of the uttering counts charged that the passing was done "with intent to defraud the United States, knowing

the payee's name to be forged thereon." Hence the acts alleged and proved fell within the scope of §495.

The conspiracy count, worded somewhat differently, charged a conspiracy to forge and utter bonds and money orders, known to have been forged, with intent to defraud the United States. Read literally, this does not charge a conspiracy to forge endorsements. *See Danielson* v. *United States,* 321 F.2d 441, 444 (9th Cir. 1963). However, the evidence showed a conspiracy to forge bonds themselves as well as to forge endorsements on valid bonds. Some of the bonds supplied by Calabro and cashed by the group were blank and had to be completed and stamped to have even counterfeit validity. Despite the genuineness of the blanks from which the defendants worked, this process is a forgery of the bonds in violation of 18 U.S.C. §471 which prohibits forging of an "obligation or security of the United States," and their uttering constitutes a violation of 18 U.S.C. §472. *See United States* v. *Craft,* 407 F.2d 1065 (6th Cir. 1969). Thus, a conspiracy to violate sections 471 and 472 was charged, even if we take a possibly overtechnical view and find that one under §495 was not, and the evidence sustained the charges. The fact that the wrong section of the statute was cited does not invalidate either the charge or the convictions if, as here, no prejudice is shown to derive from the miscitation. *United States* v. *Hutcheson,* 312 U.S. 219, 229 (1941); *United States* v. *Galgano,* 281 F.2d 908, 910-911 (2d Cir. 1960), *cert. denied sub nom. Carminati* v. *United States,* 366 U.S. 960 (1961); *United States* v. *McKnight,* 253 F.2d 817, 820 (2d Cir. 1958); Rule 7(c) Fed. R. Crim. P.[3]

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3 John claims that prejudice flowed from the use of §495 on the substantive counts based on the blank savings bonds when those counts could as well have been brought under §471. The claim is meritless for sections 471 and 472 bear higher penalties than does §495. Roche and Leonard Conforti, who could have been charged with forging postal money orders under 18 U.S.C. §500 rather than with forging endorse-

Calabro, who was convicted only on the conspiracy count, claims that though he may have been guilty of aiding the forging and uttering by selling bonds to Leonard and Graham, he did not conspire with the defendants to accomplish their aims. However, it is clear that his participation went deeper than the supplying of contraband in a few isolated transactions with no concern for the remainder of the operation. *See United States* v. *Peoni*, 100 F.2d 401 (2d Cir. 1938). He was the supplier of most of the bonds the group cashed, and though he was paid for some irrespective of whether they were cashed, he often received a percentage of the proceeds. The forging and uttering were thus a prerequisite to his realization of profit. Both Marabetti and Graham, who personally received packages of bonds from Calabro, were told by Leonard that Calabro was his boss, and Calabro himself told Faye Rushford that Leonard and Insalaco "worked for him." There was ample evidence that Calabro was a key member of the ongoing conspiracy.

John Conforti claims that he was a "fringe" defendant who entered the conspiracy late and was only tangentially involved in the transactions that occurred after he began to participate. The evidence, as noted above, belies this contention. In the early fall of 1968 he recruited Faye Rushford, telling her that the group cashed stolen bonds for a living, and he allowed his house to be used for the forging enterprise. In the late fall of 1968 and early winter of 1969, a period of particularly heavy cashing activity, John became Graham's partner and worked actively with the group. Thus, although John entered the conspiracy later than the others, the evidence was sufficient to sustain

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ments and uttering orders with forged endorsements under §495, would then have been exposed to a five-year as opposed to the ten-year maximum term they faced. However, Roche was only sentenced to five years, and Leonard received ten-year terms to be served concurrently with twenty-four other terms of equal length.

his conviction on the conspiracy count. His convictions on the substantive counts are also clearly sustainable. He assisted in the completion of the blank bonds the subject of counts 22 through 27 and received a share of the proceeds from their cashing; he aided and abetted the forging and uttering of the bonds listed in counts 14 and 15 by recruiting the woman who cashed them. On the other six counts on which he was convicted, the jury could have found him an aider and abettor because he was a member of the conspiracy at the time when the named bonds were passed. *Pinkerton* v. *United States,* 328 U.S. 640 (1946).

Tortorello also attacks the sufficiency of the evidence implicating him; he claims that even if the jury credited a statement by Graham that he was the source of twenty or more sets of false identification used to facilitate the passing of the bonds, there was no evidence that he knew when he supplied the papers that they would be used in bond-cashing activity. Under *United States* v. *Gallishaw,* 428 F.2d 760 (2d Cir. 1970), the government had to show at a minimum, to sustain the conviction of Tortorello as an aider and abettor of the forging, that he knew that the identification he supplied the group was to be used in a transaction involving forged bonds. Though details of the actual cashing would not have to be known to him, a generalized suspicion of illegal use of the identification would not suffice.

The court properly instructed the jury on this point, noting that on each substantive count the jury must find that "the act of participation was done by the particular individual knowing it was for the purpose of furthering that particular venture set forth in the count" and that the requisite intent "must include the knowledge that it was for the purpose of forging or cashing" the bonds or money orders. Existence of this knowledge can be "inferred from the circumstances," *United States* v. *Gallishaw, supra,* 428

F.2d at 763, and though the evidence on this point was not abundant, it was sufficient to allow the jury to conclude that Tortorello knew that cashing of illegal obligations was being accomplished with the false papers he sold the defendants. Leonard introduced Tortorello to Marabetti as "the Tortie that gives us the identification." Whenever the enterprise ran short of identification, Leonard would tell Roche to notify Tortorello and pick up more from him; the latter brought a batch of driver's licenses, Social Security cards and draft cards to Nero's Nook one night in July, 1968. At the time of one sale of identification directly to Marabetti Tortorello indicated that he was familiar with Calabro and knew that he had authorized the transaction. These circumstances could provide the basis for an inference that Tortorello was well acquainted with the appellants' activities and knew that their venture involved the cashing of forged obligations. *See United States* v. *Howell*, 447 F.2d 1114 (2d Cir. 1971).

III. Multiple Conspiracies

John and Calabro complain that the evidence showed multiple discrete conspiracies rather than the one charged in the indictment, and John claims that the court ought to have severed his trial from that of those involved in different agreements. The evidence, however, quite clearly established one conspiracy, extending over a three-year period, to forge and pass savings bonds, money orders, and obligations of other sorts, including municipal bonds, through an on-going network. The method of operation, the participating individuals at the middle and upper levels, and the goals of the parties to the continuing agreement remained steady throughout. Leonard and Insalaco operated the business; Roche, Pasqua, Marabetti and Graham were middle level "employees" through the money order and bond phases of the group's activities. John occu-

pied a position somewhere between the two groups, and Calabro was the supplier; though John became a member after the money order phase had terminated, and though Calabro did not supply the money orders, neither John's entry nor Calabro's resumption of supply activities after the money order hiatus marked a new agreement by the group or a change in method of operation. Though the "movers" who did the actual cashing came and went over the years, the basic network continued intact throughout the entire period.

This group of forgers in fact exhibited the characteristics of the typical "chain" conspiracy; although all of the defendants may not have known and worked directly with all the others, there is evidence that each was aware of others in the line of distribution and of the larger nature of the operation in which he or she played a part. *See* Note, Federal Treatment of Multiple Conspiracies, 57 Colum. L.Rev. 387, 390-92 (1957); *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964). This is not a situation similar to that in *Kotteakos* v. *United States*, 328 U.S. 750 (1946) in which numerous individuals, unconnected and unconcerned with one another, were tied solely to each one's involvement with one Brown. Here, the appellants were members of a large organization which they had joined with knowledge of its goals and with an intent to further them. John and Calabro were central members of this conspiratorial group.

Moreover, even if one concluded that two conspiracies were shown, one to forge postal money orders in the fall of 1967 and one of longer duration turning on savings bonds, John would not benefit thereby. "[T]he test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights. Fed. R. Crim. P. 52(a). *United States* v. *Agueci*, 310 F.2d 817, 827 (2d Cir. 1962), *cert. denied*, 372 U.S. 959

(1963); *United States* v. *Vega*, 458 F.2d 1234 (2d Cir. 1972). The requirements for sustaining a verdict in which there has been a variance have been met when there is no double jeopardy problem and no issue of unfair surprise deriving from the proof of two conspiracies rather than one (*Berger* v. *United States*, 295 U.S. 78 (1935)), and when "[t]he several conspiracies, if there had been such, could have been joined in a single indictment or consolidated for a single trial and the conduct of the trial was such that the danger resulting from the admission of evidence not chargeable to any appellant was minimal." *United States* v. *Agueci, supra*, 310 F.2d at 827.

John claims that he did suffer prejudice from the inclusion of the postal money order conspiracy in his trial because it provoked testimony about the use of threats and physical force by Leonard on one of the money order "movers" to make clear to her that she was not free to cease working for him whenever she pleased. John also claims that proof on the money order counts distracted the jury from the counts and testimony in which he was involved. Proof on the money order counts, which comprised only two of the twenty-six substantive counts, did not unduly sidetrack the trial, and the fleeting reference to physical violence in a trial of a month's duration does not warrant a severance. Nor was John a peripheral defendant, like Shuck in *United States* v. *Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966), whose connection to the overall conspiracy was so tenuous and different in quality from that of the main defendants that excessive care was necessary to avoid irreparable prejudice to him deriving merely from presence on trial with them. The trial court here took pains to explain to the jury the circumstances under which the evidence could be considered against one or more of the defendants and to avoid any prejudice to those defendants against whom

certain facts were not admissible. We find no error based on a claim of the existence or proof of more than one conspiracy under the indictment.

IV. Alleged Denial of the Right to Assistance of Counsel

The two most substantial arguments raised by the appellants arise from the alleged denial of assistance of counsel to Leonard Conforti and Joseph Calabro.

The factual background of Leonard's claim must be sketched in some detail. Conforti's retained attorney in a related case, James LaRossa, was to represent him at this trial, but when it became clear that he would be a crucial witness in a hearing on an alleged promise of immunity to Leonard, he was relieved by the court and Gerald Rosenthal was appointed to replace him. This substitution took place some time before trial, and the two had opportunities to talk about the defense in the interim. On the eve of trial, Rosenthal was appointed to represent John Conforti and his wife Loretta, named in one count dismissed at trial.

The conflict which led to Rosenthal's cessation of representation of Leonard grew out of Leonard's refusal to stipulate that the bonds named in certain counts of the indictment were in fact stolen and the signatures unauthorized. The government and all the other defendants and attorneys were willing, indeed anxious to do so, both to save time and to avoid highly prejudicial testimony. At the end of the first day of testimony by bondholders, Rosenthal announced to the court that Leonard was dissatisfied and wanted him removed from the case. Leonard objected, claiming that though they were having some difficulty, it was Rosenthal and not he who wished to sever the relationship. The court forbade Rosenthal to withdraw but advised the defendant that if he wished to dismiss his attorney he could do so and proceed pro se, with Rosenthal

present to answer his questions. Rosenthal finally stated that he would insist on entering the stipulation were he to continue with Leonard and leave it to the client whether to accept to dismiss him for that reason. Leonard remained adamant in his refusal to stipulate, and the court announced that the testimony of bondholders would continue the next day and that Rosenthal would be present to represent Leonard.

The next morning Rosenthal reiterated that Leonard and now John wished to dismiss him. Leonard explained that Rosenthal's unwillingness to tell the court that it had been he who initiated the talk of dismissal, and his refusal to "properly defend" his client were the reasons for the request. Leonard told the court that he did not feel adequate to defend himself but that he would prefer that course to continuing with Rosenthal. The court denied Leonard's request for a half-day recess in which to obtain new counsel and gave him the choice of Rosenthal or self-representation. Leonard, followed by John and Loretta, chose the latter. The court did not discuss the matter further at that time, but told them they would have every courtroom right an attorney has and "one additional right, the right to make a fool of yourself by not having a lawyer." The trial proceeded.

Early the next morning Leonard, having contacted another lawyer but failed to persuade him to take the case on such short notice, requested that the court appoint new counsel for him. Judge Mishler refused, citing the inevitable delay that would follow the entry of new assigned counsel into the case. When no other defense attorney present volunteered to represent the Confortis, the court insisted that it was Rosenthal or no one.[4] John and Loretta then

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4 The possibility that Leonard would agree to have Rosenthal reassigned had been lessened the previous afternoon when the attorney had mentioned to the court a fee dispute that he and Leonard were

accepted the reassignment of the attorney; Leonard chose to continue pro se. After he had conducted what could only be described as a disastrous cross-examination of one of the female witnesses, the court advised Leonard of some of the difficulties of pro se defense and reminded him of his continuing offer to reassign Rosenthal. Leonard refused the attorney's services and did a creditable job of representing himself throughout the remainder of the trial, conferring with Rosenthal and other attorneys when necessary.

Leonard really makes two claims—that he did not effectively waive the assistance of counsel and that the court erred in refusing to assign new counsel or to allow Leonard time to locate an attorney on his own. He claims that he made no "clear cut election" to waive his constitutional right to assistance of counsel because his request that Rosenthal withdraw did not follow "a full and calm discussion between the judge and the defendant" (*United States* v. *Spencer*, 439 F.2d 1047, 1050 (2d Cir. 1971)) with emphasis on "the risks, pitfalls, and complexities inherent in [pro se representation] and the serious consequences of conviction," *United States* v. *Duty*, 447 F.2d 449, 451 (2d Cir. 1971). Although it is true that the trial court did not, at the moment of Leonard's request, discuss as fully as would have been desirable the consequences of his acts, we are convinced that Leonard intelligently and knowingly waived his right to counsel "even without such a caveat." *United States* v. *Duty, supra*, 447 F.2d at 451.

The decision on whether a defendant has effectively waived his Sixth Amendment right to counsel depends "in each case, upon the facts and circumstances surrounding

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having in another case, thus suggesting that Leonard's claims of indigency were less than genuine. This apparent discrepancy in financial condition was explained to the court's satisfaction, however, and by this time (the morning of the second day of self-representation) Rosenthal had expressed his willingness to defend the Confortis vigorously if they would accept his reassignment.

that case, including the background, experience, and conduct of the accused." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). The factors that this court has considered in making that determination are "whether the defendant understood that he had a choice between proceeding pro se and with assigned counsel, whether the defendant understood the advantages of having one trained in the law to represent him, and whether the defendant had the capacity to make an intelligent choice." *United States* v. *Spencer*, *supra*, 439 F.2d at 1050. The fact that the defendant's pro se representation turned out to be inadequate and ineffective is irrelevant to the issue of whether the waiver of his right to counsel was knowingly or intelligently made, but it is important that the court consider whether the defendant affirmatively made a choice or whether he proceeded alone only because he felt "he had no choice" and thus did not effectively waive his right. *See United States ex rel. Higgins* v. *Fay*, 364 F.2d 219 (2d Cir. 1966); *United States* v. *Curtiss*, 330 F.2d 278 (2d Cir. 1964). The trial court must make a "record sufficient to establish to our satisfaction that the defendant 'knows what he is doing and his choice is made with eyes open.' *United States* v. *Plattner*, 330 F.2d 271, 276 (2d Cir. 1964)." *United States ex rel. Higgins* v. *Fay*, *supra*, at 222.

The record here makes clear that under this test for intelligent waiver Leonard did choose to forego Rosenthal's assistance. When he stated that he no longer desired the services of the attorney, the court conveyed to him the danger and folly of proceeding alone. And during the second day of self-representation, the court warned him more explicitly of the perils of cross-examination by one not seasoned by trial work. The court also had ample time to observe Leonard and to assess his capacity to choose pro se defense, and we concur in his conclusion that Leonard was intelligent and well understood the consequences of his

acts. Though he expressed his own sense of inability to defend himself effectively, he willingly proceeded alone, preferring his own limitations to those he felt Rosenthal possessed.[5]

As a subsidiary or alternative to the waiver argument, Leonard urges that Rosenthal deserted him rather than the reverse, by stating that he intended to enter into the stipulation contrary to his client's wishes. Leonard's claim that this was an improper act which justified the dismissal is unfounded. The American Bar Association Project on Standards for Criminal Justice concludes that a defendant is entitled to make the ultimate decision only in regard to whether to plead guilty, whether to waive a jury, and whether to testify; "all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." Standards Relating to the Prosecution Function and the Defense Function, approved draft 1971, The Defense Function §5.2. The decision on "whether to stipulate to certain facts" falls into the latter category. *Id.* p. 240; *see People* v. *Woods*, 23 Ill. 2d 471, 179 N.E.2d 11 (1961). *See generally United States* v. *Main*, 443 F.2d 900 (9th Cir. 1971), *cert. denied* 404 U.S. 958 (1972); *United States* v. *Gutterman*, 147 F.2d 540 (2d Cir. 1945).

In any case, the trial judge refused to allow Rosenthal to withdraw because of this difference over strategy and Rosenthal expressed his willingness to resume representation of Leonard even should he persist in his refusal to stipulate. The trial judge, present in the courtroom and aware of nuances which the record cannot convey, was per-

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5 The trial court, once Leonard had waived counsel, followed the practice approved in *United States* v. *Spencer*, *supra*, of offering the defendant the assistance of Rosenthal as a resource to answer questions and give advice should the defendant request it. Rosenthal was always present in the courtroom during trial, and Leonard apparently conferred with him and other defense attorneys on occasion.

suaded, we think reasonably, that Leonard was "determined to take charge of his defense, with and without a lawyer"; he now "has no just reason to complain of lack of counsel" (*Glenn* v. *United States*, 303 F.2d 536, 540-41 (5th Cir. 1962), *cert. denied sub nom. Everitt* v. *United States*, 372 U.S. 920 (1963)) for this was "a situation for which he was intentionally and knowingly responsible." *Kates* v. *Nelson*, 435 F.2d 1085, 1088 (9th Cir. 1970).

The second branch of Leonard's argument, closely entwined with the first, is that the court ought to have assigned new counsel once Leonard had dismissed Rosenthal. Once trial has begun, however, a defendant does not have the unbridled right to reject assigned counsel and demand another. *United States* v. *Burkeen*, 355 F.2d 241 (6th Cir.), *cert. denied sub nom. Matlock* v. *United States*, 384 U.S. 957 (1966); *United States* v. *Paccione*, 224 F.2d 801 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955). A defendant with assigned counsel cannot decide for no good cause on the eve or in the middle of trial that he will have another attorney represent him. *Cf. United States* v. *Abbamonte*, 348 F.2d 700 (2d Cir. 1965), *cert. denied*, 382 U.S. 982 (1966) (retained counsel). While courts must be assiduous in their defense of an accused's right to counsel, that right "may not be manipulated so as to obstruct the orderly procedure of the courts or to interfere with the fair administration of justice." *United States* v. *Bentvena*, 319 F.2d 916, 936 (2d Cir.), *cert. denied sub nom. Ormento* v. *United States*, 375 U.S. 940 (1963); *see United States* v. *Terry*, 449 F.2d 727 (5th Cir. 1971); *United States* v. *Llanes*, 374 F.2d 712 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967).

In order to warrant a substitution of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict. *Brown* v. *Craven*, 424 F.2d 1166 (9th Cir. 1970);

United States v. *Grow*, 394 F.2d 182, 209 (4th Cir.), *cert. denied*, 393 U.S. 840 (1968); *United States* v. *Gutterman*, 147 F.2d 540 (2d Cir. 1945). If a court refuses to inquire into a seemingly substantial complaint about counsel when he has no reason to suspect the bona fides of the defendant, or if on discovering justifiable dissatisfaction a court refuses to replace the attorney, the defendant may then properly claim denial of his Sixth Amendment right. *Brown* v. *Craven*, *supra*. In the absence of a conflict which presents such a Sixth Amendment problem, the trial court has discretion to decide whether to grant a continuance during the course of trial for the substitution of counsel, and that decision will be reversed only if the court has abused its discretion. *United States* v. *Main*, *supra*; *United States* v. *Grow*, *supra*.

In this case, we conclude that Leonard had no justification for his request for new counsel. Rosenthal's action regarding the stipulation was not improper, and he showed himself willing to accommodate to his client's strongly felt wishes. The attorney had been assigned before trial, and the two had discussed the case; there was no inability to communicate. Nor was the verdict unjust. We therefore find that the trial court, which may have been only too aware that a decision to honor Leonard's request would not only delay a complex trial but would produce a rash of dissatisfaction with lawyers on the part of the other defendants, did not abuse its discretion in denying Leonard's request.

Leonard calls our attention to the recent case of *United States* v. *Morrissey*, 461 F.2d 666 (2d Cir. 1972) but that case is readily distinguishable and only strengthens our conclusion. There, Morrissey had petitioned the court four times before trial for a substitution of counsel. An adjournment to effect a change of counsel would not have engendered as much delay as had already occurred through

no fault of the defendant. The defendant gave reasons for his wish which, if true, would have been good cause for a change of attorney. In this case, the first sign of dissatisfaction came during trial, revolved around an issue of trial strategy which was easily resolved, and was probed by the court, conscious of the inevitable delay a switch would entail. The court's conclusion in *Morrissey* is peculiarly apt here: "In sum, the record as a whole indicates that [Leonard's] reasons for a change of counsel were insubstantial. Thus, the trial court's proposed alternative to [Leonard] of representing himself or continuing with [Rosenthal] as counsel was proper." *United States* v. *Morrissey, supra,* 461 F.2d at 670.

Pasqua, Roche, Picciano, Moskowitz, and John Conforti claim that as a result of Leonard's antics the jury could only have viewed the trial as a "macabre charade" and that his pro se defense made it impossible for them to obtain a fair trial. They claim that the trial court erred in denying their repeated requests for severance and mistrial. The nub of their complaint is that through inept questioning on cross-examination and incessant flamboyance and posturing Leonard revealed damaging facts and brought out relationships among the female witnesses and the defendants, knowledge of which created jury compassion for the witnesses and ill will toward the defendants.

Motions for severance and mistrial are directed to the sound discretion of the trial court. *Opper* v. *United States,* 348 U.S. 84 (1954); *United States* v. *Marshall,* 458 F.2d 446 (2d Cir. 1972); *United States* v. *Kompinski,* 373 F.2d 429 (2d Cir. 1967); *United States* v. *Bentvena, supra.* Before a defendant is entitled to severance he must show that substantial prejudice derives from the joint trial and not merely that he would have had a better chance of acquittal were he tried separately. *United States* v. *Borelli,* 435 F.2d 500 (2d Cir. 1970), *cert. denied,* 401 U.S. 946 (1971); *United*

States v. *DeSapio*, 435 F.2d 272 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); Note, Joint and Single Trials under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L.J. 553, 562-66 (1965).

Tested against this standard, it is clear that the decision of the court below was correct. The inquiries on cross-examination, none of which was objected to in an attempt to halt Leonard's ill-advised course, were not as likely to cause spill-over prejudice as the disruptive outbursts in *United States* v. *Bentvena*, *supra*; *United States* v. *Marshall*, *supra*; and *United States* v. *Aviles*, 274 F.2d 179 (2d Cir.), *cert. denied sub nom. Genovese* v. *United States*, 362 U.S. 974 (1960); the fit thrown by the insane co-defendant in *Brown* v. *United States*, 375 F.2d 310 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 915 (1967); or the presence of the manacled co-defendant in *McDonald* v. *United States*, 89 F.2d 128 (8th Cir.), *cert. denied*, 301 U.S. 697 (1937), none of which was held to warrant severance or mistrial. Nor did any appellant here request ameliorative instructions which might have been appropriate. The difficulties of which these five defendants complain are not essentially different from those which any defendant might suffer in a joint trial if the efforts of counsel are not coordinated. *See, e.g.*, *United States* v. *DeSapio*, *supra*, 435 F.2d at 280-81. The denial of the motions for severance and mistrial was not an abuse of discretion.

Calabro's Sixth Amendment claim arose from an incident which occurred on the last day of trial, while the jury was deliberating into the evening. His attorney became ill in the courtroom and was taken to a hospital at approximately 10:45 p.m. The court then discussed the singular situation with Calabro, who expressed uncertainty about whether another attorney could competently represent him at that point. The court stated that he thought it would be fair for another to assume his defense temporarily but

Calabro refused to make any decision, claiming that he "couldn't say" what ought to be done; he "didn't know really." Then, without requesting another defense attorney to represent Calabro for the remainder of the evening, the court allowed the proceedings to continue. During the absence of the attorney, the court received a note from the jury and delivered a supplemental charge to them. Shortly thereafter, at 11:20 p.m., the jury returned with its verdict, finding Calabro guilty on the conspiracy count and the others guilty, as set out in n. 1. The court polled the jury on the verdict. Before adjourning, the court advised Calabro to retain other counsel before the date of sentencing.

Calabro claims that this period of time during which he was unrepresented was a "critical stage" of the proceedings during which he had a right to counsel, and that he was therefore denied his constitutional rights under the Sixth Amendment. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). The government suggests preliminarily that Calabro effectively waived his right to counsel by evasively refusing to answer the court directly but in making clear that he chose to proceed alone. We cannot find on the basis of the inconclusive conversation sketched above that the court clearly explained to Calabro his right to counsel and the possibility of his representing himself temporarily. Calabro seems to have been purposely unwilling to commit himself, but the court did not ask him pointblank which course of action he wished to take. Given the presumption against waiver of this fundamental constitutional right, we cannot conclude that Calabro knowingly and voluntarily waived the assistance of counsel.

However, in the particular circumstances present here, we conclude that Calabro was not exposed to any "reasonable possibility of prejudice in fact" (*McGill* v. *United States*, 348 F.2d 791 (D.C. Cir. 1965), that no prejudice

accrued to him as a result of the hour without counsel, and that the error was a harmless one.[6] First, the question put by the jury in its note was a repetition of an earlier question, asking whether a defendant could be acquitted on the conspiracy count and be convicted on any of the substantive charges. Unlike most of the other defendants, Calabro was charged only with conspiracy. Therefore, "the jury's question and the judge's answer had nothing whatever to do with the case against [him] or with his defense." *Walker* v. *United States*, 322 F.2d 434, 436 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 976 (1964). Despite this fact, his attorney had been given an opportunity when the question was first asked to object to the suggested response and to offer language which the court adopted as part of its answer. He had then expressly found the answer unobjectionable. The repetition of the answer to this question could not have prejudiced Calabro.[7]

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6 "The general language in *Johnson* v. *Zerbst* and Rule 44 must be read in light of their fundamental purpose to provide the guiding hand of counsel at every step where an accused who is without counsel may be prejudiced. . . . The exaltation of abstraction above reality should not be condoned for the purpose of denying constitutional rights and should not be indulged for the purpose of creating constitutional rights." *McGill*, *supra*, at 793.

7 This case is readily distinguishable from *United States* v. *Glick*, slip op. 3821 (2d Cir. June 29, 1972) in which the court delivered supplementary instructions to the jury outside the presence of the appellant (appearing pro se) and the attorney for his co-defendants. The instruction was not only directly relevant to the appellant's case, but was misleading and highly prejudicial. The court there found, as has been held in numerous other recent cases under Fed. R. Crim. P. 43 (which requires the presence of the defendant at all stages of the proceeding) that the defendant must show some prejudice or possibility of prejudice before a conviction will be set aside on the ground that the defendant, and often his attorney too, were absent during communication by the court with the jury. *See United States* v. *Arriagada*, 451 F.2d 487 (4th Cir. 1971); *United States* v. *Howard*, 433 F.2d 1 (5th Cir. 1970); *United States* v. *Schor*, 418 F.2d 26 (2d Cir. 1969); *Ware* v. *United States*, 376 F.2d 717 (7th Cir. 1967).

It is equally clear that there was no possibility of prejudice to Calabro because of his attorney's absence when the verdict was returned. *Martin* v. *United States*, 182 F.2d 225 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950); *see McGill* v. *United States*, *supra*; *cf. Newagon* v. *Swope*, 183 F.2d 340 (9th Cir. 1950), *cert. denied*, 340 U.S. 921 (1951). The court here polled the jury on its own motion and thus removed the possibility of prejudice deriving from absence of polling which disturbed the court in *Thomas* v. *Hunter*, 153 F.2d 834 (10th Cir. 1946). In *United States* v. *Smith*, 411 F.2d 733 (6th Cir. 1969), the court found that even if the jury were polled, prejudice might creep in because counsel was not present to discern hesitancy of juror responses or other facts with "significant meaning." In that case, however, the defendant was tried alone; here the numerous attorneys whose clients' interests in the polling of the jury were identical to Calabro's insured against such a possibility. In *Smith*, also, the court did not discuss the situation with the defendant at all. *See United States* v. *Clayton*, 418 F.2d 1274 (6th Cir. 1969), *cert. denied*, 399 U.S. 931 (1970). Though Calabro did not clearly waive counsel, the court did outline the situation to him and make it clear that he could get another attorney. This must have alerted him to be protective of his rights in the short period during which he was unrepresented. We therefore find the case distinguishable from *Smith*, but to the extent it is not, we decline to follow that holding. We therefore find no reversible error based on Calabro's short period without counsel. *See United States* v. *Moher*, 445 F.2d 584 (2d Cir. 1971); *Dallago* v. *United States*, 427 F.2d 546 (D.C. Cir. 1969); *United States* v. *Murphy*, 413 F.2d 1129, 1140-41 (6th Cir.), *cert. denied*, 396 U.S. 896 (1969); *cf. Chin Kee* v. *Commonwealth*, 407 F.2d 10 (1st Cir.), *cert. denied*, 395 U.S. 982 (1969).

The defendants raise numerous other points, none of which has merit. The court had reasonable non-hearsay grounds for finding the existence of a conspiracy and admitting the hearsay evidence of co-conspirators against the others. The evidence on passing of municipal bonds and other obligations was admissible either to show "similar acts" and mode of operation or as part of the same conspiracy charged in the indictment, although we note that it might have been wise to exclude it given the other clear and overwhelming evidence of the group's activities.

Finding, therefore, none of the claims made by appellants sufficient to warrant reversal, we affirm their convictions and refuse to disturb the verdict below.

APPENDIX B

Amendment V to the United States Constitution

"• • • nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law • • •."

Title 18, §495 United States Code

§495. Contracts, deeds, and powers of attorney

"Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited;

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

Title 18, §2 United States Code

§2. Principals

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-743

ANTHONY TORTORELLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-766

JOSEPH CALABRO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-5730

JOHN CONFORTI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-5733

LEONARD CONFORTI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-5909

ANTHONY PICCIANO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

402-641—73——1

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a lengthy jury trial in the United States District Court for the Eastern District of New York, petitioners were variously convicted of forging and uttering United States Series E Savings Bonds and United States Postal Money Orders in violation of 18 U.S.C. 495 and of conspiring to do so in violation of 18 U.S.C. 371. They were given sentences ranging from probation to ten years' imprisonment; in addition, fines of $10,000 and $26,000 were imposed on petitioners Calabro and Leonard Conforti, respectively. The evidence upon which the convictions were based is fully summarized in the opinion of the court of appeals (Pet. App. 4a–8a;[1] 467 F. 2d 973, 978–980).

With one exception, which we shall discuss below, all of the contentions which petitioners raise here were rejected after full consideration by the court of appeals, upon whose opinion we primarily rely. Thus, Tortorello's claim (No. 72–743) that there was insufficient evidence to sustain his conviction as an aider and abettor is answered at Pet. App. 11a–12a (467 F. 2d at 982). Calabro's claim (No. 72–766) that he was convicted in violation of his Sixth Amendment right to counsel because of the absence of his attorney due to illness during part of the jury's deliberations and

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[1] "Pet. App." refers to the appendix to the Tortorello petition, No. 72–743.

when the verdict was received is answered at Pet. App. 23a–26a (467 F. 2d at 988–989).[2] John Conforti's contentions (No. 72–5730) that (1) he was prejudiced because the evidence assertedly showed multiple conspiracies rather than a single conspiracy (Pet. 9–11), that (2) the trial court admitted hearsay evidence without specifically ruling on its admissibility under the co-conspirator exception to the hearsay rule (Pet. 11–12), and (3) that there was insufficient proof of his participation in the conspiracy (Pet. 12–13), are answered at, respectively, (1) Pet. App. 12a–15a (467 F. 2d at 982–983), (2) Pet. App. 27a (467 F. 2d at 989), and (3) Pet. App. 7a–8a, 10a–11a (467 F. 2d at 979–980, 981). The contention by Picciano, *et al.* (No. 72–5909) that they were improperly denied a sever-

[2] Petitioner Calabro claims that the decision below is inconsistent with decisions of the Sixth and Tenth Circuits. (*United States* v. *Smith*, 411 F. 2d 733 (C.A. 6); *Thomas* v. *Hunter*, 153 F. 2d 834 (C.A. 10)). The court below noted that these cases are distinguishable, and correctly preferred to follow the reasoning of the Fifth Circuit in *Martin* v. *United States*, 182 F. 2d 225, certiorari denied, 340 U.S. 892, and *Kent* v. *Sanford*, 121 F. 2d 216, certiorari denied, 315 U.S. 799. The District of Columbia and the Ninth Circuit probably agree with the Fifth Circuit and the court below. See *McGill* v. *United States*, 348 F. 2d 791 (C.A. D.C.) (absence of counsel at arraignment when defendant pleads not guilty does not harm defendant; to find denial of constitutional right in such circumstances would exalt form over substance); *Newagon* v. *Swope*, 183 F. 2d 340 (C.A. 9) (voluntary absence of counsel when verdict returned does not deprive defendant of constitutional rights) and *Lovvorn* v. *Johnston*, 118 F. 2d 704 (C.A. 9) (same). To the extent there is any inconsistency, the question is of such infrequent occurrence and marginal significance that certiorari would not be warranted.

ence is answered at Pet. App. 22a–23a (467 F. 2d at 987–988).

Leonard Conforti's contention (No. 72–5733) is that he was denied his Sixth Amendment right to counsel at a post-verdict hearing on his claim that he had been promised immunity during a plea bargaining session in connection with another indictment. Conforti had dismissed his assigned attorney in the middle of the trial itself after a disagreement on tactics; the main thrust of his argument to the court of appeals was that the trial court's refusal to assign substitute counsel for the remainder of the trial constituted a Sixth Amendment violation. The court of appeals fully considered and rejected this contention, holding that Conforti waived his right to counsel by dismissing his assigned attorney without good cause (Pet. App. 15a–22a, 467 F. 2d at 983–987), and he is apparently not pursuing the claim before this Court. His subsidiary argument below regarding the post-trial hearing, upon which he places his sole reliance here, was apparently among the "numerous other points, none of which has merit" which the court of appeals also rejected (Pet. App. 27a, 467 F. 2d at 989). This holding in no way suggested that the Sixth Amendment right to counsel does not extend to proceedings collateral to trial. Rather, it constituted acceptance of the government's argument that Conforti—with full knowledge of his right to counsel—had an adequate opportunity during the nine day interval between trial and the hearing on his immunity claim either to retain an

attorney[3] or request that one be assigned to assist him at that hearing, and that he had waived his Sixth Amendment right by failing to take either step. As we pointed out in the court below, the trial court had made it quite clear that its refusal to appoint substitute counsel during trial was motivated solely by consideration of the trial delay which would inevitably have been entailed thereby in this complex, multiparty case; there was nothing in the ruling which precluded a post-trial motion for assignment of counsel when trial delay was no longer a factor.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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[3] When Conforti dismissed his trial attorney, he first attempted to retain counsel before requesting that counsel be assigned (see Pet. App. 16a, 467 F. 2d at 984).

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